In the Supreme Court of the United States

OCTOBER TERM, 1942.

No. 319.

FIDELITY ASSURANCE ASSOCIATION, *et al.*,
Petitioners,

vs.

EDGAR V. SIMS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

BRIEF AMICI CURIAE OF VICTOR SALKELD, ET AL., CREDITORS OF THE DEBTOR.

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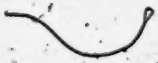

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BRIEF AMICI CURIAE OF VICTOR SALKELD, ET AL., CREDITORS OF THE DEBTOR.

This is a voluntary proceeding of Fidelity Assurance Association, a corporation, herein called Fidelity, for reorganization under Chapter X of the Bankruptcy Act. The District Court found that Fidelity was not an insurance company, and that its petition was filed in good faith. The Circuit Court of Appeals for the Fourth Circuit found that it was an insurance company and that its petition was not filed in good faith, and directed the District Court to dismiss the proceeding.

Accordingly, the questions presented here are:

1. Is Fidelity an insurance company?
2. Was the petition filed in good faith?

IS FIDELITY AN INSURANCE COMPANY?

On behalf of contract holders, we contend that it is not an insurance company within the meaning of the Bankruptcy Act. A charter granting it power to do an insurance business is not the sole test of whether or not a corporation is an insurance company. Its susceptibility to the Bankruptcy Act does not depend entirely upon its charter. The business it really transacted, and the business that is to be administered by the Bankruptcy Court may be examined to determine whether it is an insurance company. Its charter is some evidence that it is an insurance company, but its actual activities may be looked into to explain or rebut such evidence. If the insurance business actually transacted is merely incidental to its primary and predominant activities, it is not an insurance company, but if its primary and predominant business is writing insurance then it is an insurance company. *Re Supreme Lodge of the Masons' Annuity*, 286 Fed. 180 (D. C.); *Re Kingston Realty Company*, 160 Fed. 445 (2 C. C. A.); *Grand Lodge, etc. v. McKee*, 95 Fed. 2d 474 (5 C. C. A.).

Congress has recognized that the judicial test of what constitutes an insurance company is sound and reasonable. It has adopted the judicial test as applied to investment companies and proceedings in bankruptcy of face amount certificate companies. Congress has declared an investment company, which includes a face amount certificate company, shall not be classified as an insurance company, unless its primary and predominant business activity is writing insurance. It has enacted a statute declaring that an investment company and a face amount certificate company in bankruptcy proceedings should not be classified as an insurance company unless it was organized as an insurance company, and unless its primary and predominant business activity is the writing of insurance. If writing insurance is merely incidental to its primary business, then it should not be

classified as an insurance company. The Investment Company Act of 1940, at the outset, provides:

> "(a) When used in this subchapter and sections 72 (a), last sentence, and 107 (f) of Title II, unless the context otherwise requires—
>
> "* * *
>
> "(17) 'Insurance Company' means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar official or any liquidating agent for such a company, in his capacity as such."
>
> 15 U. S. C. A., par. 80a-2 (a) (17).

The subchapter is on the subject of investment companies, and section 107 (f) of Title II, above referred to, is on the subject of bankruptcy proceedings of face amount certificate companies, both of which are parts of the same act of Congress, i.e., Investment Company Act of 1940; 54 U. S. Statutes at large, Chapter 686, commencing at page 789, and commencing at page 835, respectively.

Having thus defined an insurance company, all other definitions are excluded. The doctrine of *expressio unius exclusio alterius* applies.

Measured by the test of its business activities, Fidelity is not an insurance company. Its primary and predominant business was selling annuity contracts on the installment plan, and investing the proceeds of the sales. Such insurance as it wrote, even if valid, was merely supplemental to its annuity contract and investment business. (We contend they wrote no valid insurance.)

Fidelity was organized under the laws of West Virginia in 1911, and for a period of over twenty-eight years, ending on December 31, 1940, its activities were *exclusively*

selling its own annuity contracts and investing the proceeds thereof. Prior to December 31, 1940, it did no insurance business whatever of any kind or description. Its charter granted it no power to do any insurance business. Prior to December 31, 1940, it sold 87,999 annuity contracts to purchasers located in forty-eight states, the District of Columbia and foreign countries, that are still outstanding. The face amount of said contracts is over $181,000,000, and the net cash liability of Fidelity under said contracts, as of April 10, 1941, was over $23,000,000, and the value of its assets as of June 6, 1941, was over $21,000,000. Its average liability to each contract holder was under $275.00.

By December 31, 1940, it had sustained losses to such an extent that its capital and surplus was wiped out and it had become insolvent. Its liabilities exceeded its assets. On that date, in order to avoid the requirements of the Investment Company Act enacted by Congress shortly prior thereto, its charter was amended to enable it to do a life insurance business in addition to the annuity contract and investment business. However, it did no valid insurance business after December 31, 1940.

After the charter was amended the Insurance Commissioner of West Virginia delivered a license to Fidelity authorizing it to do an insurance business for a period of three months beginning January 1, 1941, and ending April 1, 1941, but at the same time exacted a promise from Fidelity that it would do no insurance business without his permission. It sold no insurance contracts to new customers. However, it made an abortive attempt to do some insurance business with its old customers to whom it had previously sold annuity contracts. Without the permission of the Insurance Commissioner it offered riders to Series B contract holders, to be attached to their annuity contracts, without requiring the payment of any premium by the contract holder. The riders provided that Fidelity should assume certain insurance obligations. Its holders had been previ-

ously insured by Lincoln Life Insurance Company in a group policy to whom Fidelity paid the insurance premium. Lincoln Life Insurance Company continued to carry its insurance obligations the same as before. 9,802 contract holders out of 87,999 contracts outstanding accepted the riders.

The Insurance Commissioner refused to deliver a new license after April 1, 1941, and on April 11, 1941, brought an action against Fidelity in the State Court of West Virginia, wherein the State Court appointed a receiver for Fidelity. On June 6, 1941, Fidelity filed a petition to reorganize under Chapter X of the Bankruptcy Act. The District Court found that Fidelity was not an insurance company and filed its petition in good faith and approved it. On appeal, the Court of Appeals found it was an insurance company and its petition was not filed in good faith, and directed the District Court to dismiss it.

It is conceded that Fidelity was not an insurance company prior to December 31, 1940, but it is contended that the 87,999 contract holders were deprived of the benefits of Chapter X of the Bankruptcy Act because Fidelity was transformed from a face amount certificate company into an insurance company. The transformation took place when its charter was amended authorizing it to do an insurance business, and when it sent out the riders, heretofore described. We contend that the amendment and the riders did not transform Fidelity into an insurance company because its primary and predominant business activity was selling annuity contracts and investing the proceeds thereof. The riders merely supplemented contracts already sold and outstanding in the hands of purchasers. It sold no insurance contracts to old customers, except as above set forth, and sold no insurance contracts of any kind to new customers. The number of riders accepted by old customers was 9,802 out of 87,999 contracts outstanding.

We contend that the riders were not effective because—

1. The license to do an insurance business was delivered conditionally.
2. It had no paid-up capital or surplus security invested.

1. The License to Do an Insurance Business Was Delivered Conditionally.

The Commissioner delivered the license to Fidelity upon the express condition that it should not become effective without his permission. He exacted a promise from Fidelity that it do no insurance business without his consent. He never gave his consent, consequently the license he did deliver never became effective.

2. It Had No Paid-up Capital or Surplus Securely Invested.

The statute of West Virginia prohibits Fidelity doing an insurance business without $200,000 cash capital fully paid up and a like amount of surplus securely invested. On December 31, 1940, and thereafter, it had no cash capital whatever and it had no cash surplus securely invested, and it was insolvent; its liabilities exceeded its assets. Section 3326 (1) West Virginia Code provides:

> "No life insurance company shall be admitted to do business in this state, *or shall directly or indirectly enter into contracts of insurance, issue policies,* take risks or transact business in this State, unless it has at least two hundred thousand dollars cash capital fully paid up or a like amount of cash surplus, securely invested; Provided that this section shall not apply to fraternal benefit Societies organized in pursuance of the provisions of Art. 8 (Sec. 3411, *et seq.*) of this chapter."

Accordingly, we respectfully submit that Fidelity was not transformed from a face amount certificate company

into an insurance company, and its creditors by the alleged transformation were not deprived of the benefit of Chapter X of the Bankruptcy Act.

WAS THE PETITION FILED IN GOOD FAITH?

The answer to this question involves a consideration of two subsidiary questions:

(a) Is it reasonable to expect that a plan of reorganization can be effected?

(b) Is a proceeding pending wherein the best interests of creditors will be served?

(a) Is It Reasonable to Expect that a Plan of Reorganization Can be Effected?

On behalf of contract holders we contend that the petition was filed in good faith because it is reasonable to expect that a plan of reorganization can be effected, and no proceeding is pending wherein the best interests of creditors will be served.

Several plans have been considered, but because the question arose as to the want of jurisdiction of the Federal Court, no plan has been prepared and filed. It is time enough to do the work required to prepare a plan of reorganization after the question of jurisdiction has been finally disposed of. If this Court finds that the Federal Court has jurisdiction of this proceeding a plan will, in due course, be prepared and filed, but if this Court finds that the Federal Court has no jurisdiction, no plan, of course, will be prepared and filed.

Among other plans given serious consideration, is a plan contemplating the orderly liquidation of Fidelity. If liquidation over a long period of time is desired by the requisite amount of creditors, we see no reason why a plan effectuating such liquidation is not permissible under the provisions of Chapter X. Such a plan would almost neces-

sarily result in at least partial continued operation of the concern, although not for an unlimited period. Even if the old business is not to be continued, and the reorganized debtor is to limit its activities to the orderly liquidation of its assets, we see no reasen why such a plan may not be promulgated under Chapter X. Does it cease to be a reorganization if the purposes and aims of the corporate activities are changed? Or if the life of the corporation is limited?

There is no legal objection to a plan of orderly liquidation.

It is now settled that such a plan of reorganization is permissible under Section 77B of the Bankruptcy Act. *R. S. Witters Associates, Inc. v. Ebsary Gypsum Company*, 93 Fed. (2d) 746; *In re Central Funding Corporation*, 75 Fed. (2d) 256; *In re Reynolds Investing Company, Inc.*, No. 27,863 U. S. District Court of New Jersey; *In re Cuyahoga Finance Company*, No. 56,391, U. S. District Court for the Northern District of Ohio.

In *In re Reynolds Investing Company, Inc.*, John Gerdes, the well known authority on Corporate Reorganization, prepared such a plan of reorganization. In his report as trustee of the Debtor, he said:

> "The plan proposes liquidation through the medium of a reorganized Debtor rather than through an adjudication in bankruptcy, because: (1) the extent of the solvency of the Debtor is uncertain, and a judicial determination of the extent of such insolvency would involve protracted litigation, be expensive, and, in the end, be useless; (2) complete and satisfactory liquidation is a practical impossiblity within the time ordinarily contemplated by bankruptcy or other liquidation through legal proceedings; (3) corporate management is more flexible and better able to meet unforeseen contingencies in a liquidation over a long period of time than is the case where the liquidation is managed by officers of a court; and (4) control of liquidation which

necessarily extends over a long period of time should be under the direct and immediate control of those primarily interested—the debenture holders and stock owners."

The decisions of the Court in the cases of *R. S. Witters Associates, Inc. vs. Ebsary Gypsum Company*, 93 Fed. (2d) 746, and *In re Central Funding Corporation*, 75 Fed. (2d) 256, holding that a plan of orderly liquidation was permissible under Section 77B of the Bankruptcy Act, was before Congress at the time it amended the Act by enacting Chapter X, and since Congress did not see fit to exclude such a plan of reorganization, it must be presumed that Congress approved the judicial construction given its prior legislation of substantially the same import. *Re Wisc. Nat. Bank v. Wisc. Cooperative Milk Pool*, 119 Fed. (2d) 999 (7 C. C. A.).

Such a plan is permissible under the Chandler Act. Thus in *In re Porto Rican American Tobacco Company*, 112 Fed. (2d) 655, in a proceeding to reorganize the debtor under Chapter X, the Second Circuit Court of Appeals held that such a plan of reorganization was permissible. The appellant urged that such a plan is not permissible because such a plan does not constitute a plan of reorganization, but only a method of liquidation. On appeal from an order of the District Court approving such a plan at page 667 the Court held in part:

"* * * * but the plan involving ultimate liquidation is not contrary to the terms of the reorganization provision of the Bankruptcy Act. * * *"

An exhaustive search discloses there are no decisions to the contrary either under Section 77 B or Chapter X of the Bankruptcy Act.

We therefore respectfully submit that it is reasonable to expect that a plan of reorganization can be affected.

(b) Is a Proceeding Now Pending Wherein the Best Interests of Creditors Will be Served?

We contend that no proceeding is now pending wherein the best interests of creditors will be served. Twelve separate proceedings are now pending in the courts of twelve different states. These are the states wherein Fidelity deposited securities to secure the payment of contract holders. The best interests of creditors will not be served by any one or all of said state court proceedings because—

(1) The Federal Court has jurisdiction to approve and confirm a plan of reorganization of Fidelity and no state court proceeding is pending to reorganize Fidelity, and no state court has jurisdiction to approve and confirm a plan of reorganization.

(2) The decision of the Federal Court in respect of controversies in relation to its assets and liabilities will be uniform, and there is no assurance that the decisions of the state courts will be uniform.

(3) If liquidation is desired by the requisite amount of creditors, their best interests will be served if the Federal Court retains jurisdiction, because—

(a) A liquidation through the medium of a reorganized debtor is better than piece-meal liquidation in twelve separate court proceedings.

(b) A single corporate management is more flexible and better able to meet unforeseen contingencies in a liquidation over a long period of time than is the case where the liquidation is managed by officers of twelve different courts.

(c) Control of a liquidation which necessarily extends over a long period of time should be under the direct and immediate control of those primarily interested—the contract holders.

CONCLUSION.

We therefore respectfully submit that—

1. Fidelity is not an insurance company.
2. The petition was filed in good faith.

Respectfully submitted,

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